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No._____

In The

Supreme Court of the United States

October Term, 1994

LEADERSHIP SOFTWARE, INC
Petitioner,

v.

KEPNER-TREGOE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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129 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred holding that Leadership Software, Inc. committed infringement of Kepner-Tregoe, Inc.'s copyright in training materials which teach application of a participative management theory, by incorporating heart and sole elements of the theory into a computer program?

2. Whether for a constitutionally correct determination of the scope of protection accorded a copyrighted work a proper substantial similarity test for analyzing whether an accused work infringes upon such copyrighted work, there should be a single standard in which the impact of a copyright infringement finding upon competition and development of the arts and science must be considered?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Leadership Software, Inc. (hereinafter "LSI"), hereby petitions this Court to issue a writ of certiorari to review a decision of the Fifth Circuit Court of Appeals. The Fifth Circuit held that LSI committed copyright infringement by marketing a computer program which displayed certain heart and sole elements — definitions and problem attributes —

which were contained in copyrighted training materials owned by Respondent, Kepner-Tregoe, Inc. (hereinafter "K-T"), these training materials being an implementation of a popular theory of participative management. The computer program was an implementation of an extension of this theory of participative management.

The Fifth Circuit, like the several other circuits, have failed to properly determine the scope of protection to be accorded purported works of authorship, under the copyright statutes. Indeed, the Fifth Circuit's decision is especially indicates the extent of the circuits' misapprehending fundamental copyright law: the holding accords copyright protection to mere abbreviations. Accordingly, copyright infringement cases have been and continue to be decided based upon a nonexistent standard, with courts rendering uneven and unpredictable substantial similarity analyses, thereby causing

distress to legitimate businesses, particularly in the computer software industry.

This case affords an excellent vehicle for this Court to resolve the conflict between the circuits and to establish a standard for ascertaining the scope of protection to be accorded copyrighted works of authorship — from textbooks to training materials to sophisticated computer programs. Unlike many of the computer software cases that have been recently decided by the appellate courts, the instant case does not complicate the issue with complicated internal structures or mathematical algorithms; it is a vanilla-flavored case involving this protectability issue applied to literal text which appears in copyrighted training materials and display screens generated by a computer program.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527 (5th Cir. 1993), and is reprinted in the appendix App. A. The denial of the petition for rehearing is represented in the appendix App. D. The judgement of the District Court for the Southern District of Texas is reprinted in the appendix App. B. The District Court's findings of Fact and Conclusions of Law is reported at *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 22 U.S.P.Q.2d 1788 (S.D. Tex. 1992) and is reprinted in the Appendix App. C.

STATEMENT OF JURISDICTION

LSI brought a timely appeal to the Fifth Circuit under 28 *U.S.C.* §§ 1291 and 1292 (a)(1). The Fifth Circuit decision affirming the trial court but modifying the scope of the permanent injunction was entered on February 2, 1994

(App. A). Rehearing was denied on March 16, 1994 (App. E). This Court's jurisdiction is invoked under 28 *U.S.C.* § 1254 (1). This petition was timely filed within the prescribed 90-day period under Rule 13.4.

STATUTES AND REGULATIONS INVOLVED

17 *U.S.C.* § 102 (b). *Subject Matter of Copyright: In General*

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

In addition, the case raises issues concerning application of a regulation promulgated by the Copyright Office:

37 *C.F.R.* § 202.1 Material not subject to copyright.

(a) Words and short phrases such as names, titles and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.

(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing.

STATEMENT OF THE CASE

A. IDENTITY OF THE PARTIES

LSI, a Texas corporation, formerly was in the business of developing and marketing a computer program entitled "Managing Participation in Organizations" and referred to by the acronym "MPO." LSI is joined owned by Victor H. Vroom who is a chaired professor at Yale University and Arthur G. Jago who is a chaired professor at the Univeristy of Houston.

K-T is a Maryland corporation which is in the business of marketing and conducting management training seminars.

B. DEVELOPMENT OF VROOM-YETTON AND VROOM-JAGO THEORIES OF PARTICIPATIVE MANAGEMENT

This case addresses the issue of the scope of constitutionally authorized protection for nondramatic literary works under the copyright statutes and associated regulations. From petitioner LSI's vantage point, the trial court's decision and the Fifth Circuit's affirmance thereof extended copyright protection to, and found LSI guilty of infringing upon, the heart and soul elements of a popular theory of participative management. This heart and soul, consisting of a set of five definitions or "processes" and eight related questions or "problem attributes," was posited by its discoverers to constitute the basis for analysis of the extent of

participation in typical leadership management scenarios. Accordingly, any practical model of this theory of participative management must expressly invoke this set of processes and problem attributes.

Both the trial court and the Fifth Circuit decisions fail to properly classify these heart and sole elements as "idea" not "expression" and fail to deem these elements as being unworthy of protection as contemplated under the copyright laws.

This case specifically involves two works: (1) an implementation of the Vroom-Yetton theory which was published in a widely used text entitled Leadership and Decision-Making by University of Pittsburgh Press in 1973 and written by Professor Victor H Vroom and Philip W. Yetton of Carnegie-Mellon University, used for management

training seminars; and (2) a computerized implementation of an extension of the Vroom-Yetton theory, used by individual readers of a book elucidating this extension. Certain materials, modeling the Vroom-Yetton theory entitled "Leadership and Decision Making Cases and Manuals" including: (1) Definitions of Problem Attributes; (2) Problem Attributes; (3) Types of Management Decision Styles; (4) Problems and Acceptable Management Styles; (5) Decision Process Flow Chart; (6) Rationals; and (7) Rules; were registered with the U.S. Copyright Office with Prof. Vroom and Dr. Yetton as claimants.

K-T acquired the exclusive rights to use these particular materials by executing a license agreement with Prof. Vroom and Dr. Yetton in 1972. Under the terms of this agreement, K-T was required to pay royalty to its licensors and could buy out the license for a lump-sum

payment. K-T exercised its option to buy out the license for this 7-part implementation of the Vroom -Yetton theory in 1989. The terms of the 1972 agreement included within the scope of the license, modification and improvements to the program, which, based upon the syntax therein arguably refers only to an existing computer program.

Profs. Vroom and Jago jointly extended the Vroom-Yetton theoretical principles announced initially in 1971 and described in the Leadership and Decision-Making text. This Vroom-Jago theory of participative management was published in a text entitled The New Leadership by Prentice-Hall in 1988.

LSI developed a computer program entitled "Managing Participation in Organization" with acronym "MPO" which was designed to be executed on a personal

computer in conjunction with The New Leadership text. Thus, MPO is a computerized model of the concepts and processes articulated in this text and is marketed therewith, via references in the text and a tear out mailing card on the back page.

The MPO computer program was originally created by Prof. Jago in 1983 and was designed to exploit the availability of personal computers. All rights in the MPO computer program were later licensed by Prof. Jago to LSI. In March 1987 the MPO program was shipped in interstate commerce and was then made available for distribution to readers of The New Leadership text in 1988. MPO is not intended nor designed to be a replacement for K-T's training seminars. The MPO computer program was registered in May 1988 with the US Copyright Office.

K-T was regularly kept informed by Professor Jago of the writing of "The New Leadership" text containing a comprehensive exposition of the Vroom-Jago theory relative to and in view of the Vroom-Yetton theory. Concomitantly, K-T was kept apprised of the Vroom-Jago model incorporated into the MPO computer program. In July 1987 a letter was forwarded from K-T to Professor Jago indicating an interest to license the MPO computer program. Professor Jago and K-T exchanged proposed license agreements during 1987-1988 for the MPO program, and K-T met with Professor Jago in July 1987 in New Haven, Connecticut to negotiate licensing terms.

In March 1989, K-T sent a demand letter to Prof. Vroom demanding that the all materials pertaining to improvements and modifications to the Vroom-Yetton model since 1972 be relinquished to K-T, and that the Vroom-Jago

manifest in the MPO computer program not be licensed or other wise distributed to the public. The instant litigation ensued, wherein, as a result of the trial court misapprehending copyright law and granting in succession a TRO, a temporary injunction and a permanent injunction restraining LSI from manufacturing, using, offering for sale, selling and distributing the MPO computer program and all future modifications thereof, LSI has ceased marketing the MPO since March 12, 1990.

C. PROCEEDINGS BELOW

On March 7, 1990, K-T brought its complaint against LSI in the U.S. District Court for the Southern District of Texas, Houston Division, alleging copyright infringement of K-T's exclusive rights in particular copyrighted materials. Contemporaneously, K-T requested that a temporary restraining order and a preliminary injunction issue. The

Honorable Melinda Harmon granted a temporary restraining order on March 12, 1990 restraining LSI from manufacturing, using, offering for sale, selling and distributing the MPO computer program, except that use of MPO was permitted during a conference held at Yale University from March 13-17, 1990.

On March 16, 1990, LSI responded to K-T's motion for a temporary restraining order and a preliminary injunction, arguing that such an extreme remedy be denied on the basis that the complained of elements were idea not expression and hence not protectable by copyright, and that K-T's protracted delay in bringing this action after several years of regular business communications with LSI's principals precluded this equitable remedy. LSI nonetheless agreed to a temporary injunction on March 19, 1990, expecting K-T to agree that a new version of the MPO computer program was non-

infringing.

LSI answered the complaint on March 29, 1990 alleging affirmative defenses of laches, acquiescence, waiver, estoppel and fair use. K-T filed a motion for leave to file an amended complaint on May 1, 1990. The amended complaint charged Arthur G. Jago and LSI with copyright infringement. K-T was granted leave to file its amended complaint on July 16, 1990. LSI and Prof. Jago answered the amended complaint on May 1, 1990 echoing the affirmative defenses recited in the original answer.

The case was heard in a bench trial August 6-7, 1990. On January 7, 1992, the Court signed a judgment in favor of K-T, awarding damages in the amount of $46,000.00 and a permanent injunction enjoining LSI from copying, producing, distributing and/or selling the MPO computer program or any

modifications thereof or in any way infringing Copyright Registration No. A-280369. Findings of Fact and Conclusions of Law were entered on January 9, 1992.

LSI filed notice of appeal on December 21, 1992. On February 2, 1994, the Fifth Circuit issued an opinion affirming the trial court's ruling regarding copyright infringement and modified the language of the permanent injunction to the extent its enjoining LSI from marketing all future modifications of the MPO computer program conflicted with the copyright laws (App. A). LSI filed a petition for rehearing which the Fifth Circuit denied on March 16, 1994 (App. E).

REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT'S SCOPE OF COPYRIGHT PROTECTION DECISION CONTRAVENES THE COPYRIGHT STATUTES AND UNDERLYING CONSTITUTIONAL AUTHORITY

The Fifth Circuit held that LSI committed copyrighted infringement of K-T's "Leadership and Decision Making Cases and Manuals" training materials by developing and marketing the MPO computer program, which displays a substantially similar rendition of the heart and sole elements of the Vroom-Yetton theory of participative management. App. A. But the Fifth Circuit failed to appreciate that, indeed, any incarnation or implementation of the Vroom-Yetton theory, be it a related theory of participative management like the Vroom-Jago theory or an article or text evaluating leadership management and the like, must recite

verbatim the heart and sole elements that constitute the Vroom-Yetton theory. It is these heart and sole elements that distinguish one theory from another.

Thus, the Fifth Circuit affirmed the trial court's holding that the MPO computer program's display reciting the set of five definitions or "processes" and eight related questions or "problem attributes" constituted copyright infringement. But discussing or modeling a theory of nature or a proposed theory of nature cannot be accomplished without articulating the theory's basic tenets. This Court's time-honored *Baker v. Selden* decision held that a first author may not monopolize an idea and all material incident to describing the idea, whereby later authors are prevented from referring to or discussing the idea. 101 U.S. 99, 103 (1880). Prohibiting a scholar, teacher, trainer or competitor from using such basic ideas and related terminology and

descriptions incident to such ideas contravenes the clear and recently reinforced intent of the framers of the constitution. As articulated by this Court, copyright accomplishes the constitutional purpose of promoting the progress of science and useful arts, under Art. I § 8, cl. 8, by "encourag[ing] others to build freely upon the ideas and information conveyed by a work." *Feist Publs. v Rural Tel. Service Co.*, 111 S. Ct. 1282, 1289 (1991) (citation omitted).

LSI was found guilty of copyright infringement for marketing the MPO computer program concomitantly with the sale of its book Leadership and Decision-Making. But this management text was written to share the knowledge and discoveries of Profs. Vroom and Jago regarding an extension of the Vroom-Yetton theory. As observed by this Court, "the very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it

contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Feist*, 111 S. Ct. at 1290, citing *Baker v. Selden*, 101 U.S. at 103. Surely, providing the purchaser of a book the option to order a work-along diskette containing a custom-developed computer program does not contaminate the authors' purposes. If the authors or owners of a purported scientific text may not be found to be guilty of copyright infringement for merely using the heart and sole definitions and the like of a predecessor theory, how can the presence of the same or substantially similar language on computer-generated display screens be any different? Indeed, K-T complains about the appearance of these heart and sole in the MPO computer program, not the accompanying text.

This Court has made it clear that not all copying constitutes copyright infringement, *Feist* at 1296, and that

"[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity." *Feist*, 111 S. Ct. at 1297. Furthermore, it is well settled that copyright protects original expression not ideas. Id. at 1293; 17 *U.S.C.* § 102 (b). Thus, in view of this clear statutory prohibition against affording copyright protection to ideas, the protectability issue in this case devolves to whether the heart and sole elements to which K-T claims exclusive rights, separate from the particular works in which these core elements are incorporated, constitute unprotectable "idea" or protectable "expression."

The Fifth Circuit affirmed the trial court's conclusion that these heart and sole elements were protectable expression, rejecting LSI's argument that any incarnation or version of the Vroom-Yetton model went hand-in-glove with

the Vroom-Yetton theory. Interestingly, the Fifth Circuit characterized the Vroom-Jago proposed theoretical extension of the Vroom-Yetton theory as not only failing to describe all conceivable features of the management decision-making landscape, but also failing to organize and package its managerial truisms in a single, unique, ineluctable way. The scientific method demands that any purported scientific hypothesis be extensively discussed, criticized and tested prior to its being subsumed into the collective knowledge constituting the laws of nature.

But the Fifth Circuit seems to have lost sight of the scientific method, on the one hand, and of the clear purpose of the copyright statute, on the other hand. That a hypothesis is unproven, is rejected by peers, or is incomplete, does not preclude its putative or incipient status of being a theory. As is typical in the field of scientific research and study, a new

hypothesis must meet the challenges and tests of experts in the field before it is accepted as a theory of nature. But during its trial period, such hypothesis is nonetheless an idea, concept and the like, as contemplated under the Copyright Statute as being non-copyrightable subject matter. *See* 17 *U.S.C.* § 101 (b). If this decision is allowed to stand, the invaluable work of scholars and other innovators will be left to the whim of first authors and, unfortunately, will relegate the machinery of the federal courts to being instruments adverse to, rather than supporting, progress of the useful arts and science.

B. THE CIRCUITS FAIL TO APPLY THE SAME STANDARD FOR RELIABLY AND PREDICTABLY ASSESSING THE SCOPE OF PROTECTION TO BE AFFORDED A COPYRIGHTED WORK

As recently acknowledged by the Tenth Circuit, "separating idea from expression [] is one of the basic parts of

a substantial similarity analysis. *Autoskill Inc. v. National Education Support Systems Inc.*, 26 U.S.P.Q.2d 1829, 1839 (10th Cir. 1993), citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931). Indeed, as in the instant case, when a court misapprehends the distinction between idea and expression, the ensuing substantial similarity analysis typically unjustly dooms the defendant to be deemed guilty of copyright infringement. But, where such (definitional) elements of a defendant's work are so intertwined with the underlying theory and models, or so incidental to the underlying concepts, a court's misconstruing the boundary between idea and expression not only wrongly stifles and penalizes an innocent second comer and the like, but also stifles the progress of the useful arts and science by granting an author a monopoly based upon ideas, processes, methods, etc. This limitation upon copyright protection, clearly contravenes the

copyright statutes, 17 *U.S.C.* § 102 (b), and has been emphasized by this Court on several occasions. See, e.g., *Feist*, 111 S. Ct. at 1289.

But the rub is not so much that an idea-expression dichotomy exists, but that on a particular set of facts, how does a court ascertain the boundary where idea may be separated from expression? This pregnant issue was addressed in the time-honored case of *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, in which Judge Learned Hand announced the often cited "Abstractions Test" for analyzing substantial similarity between a copyrighted work and an accused infringing work. This test was intended to help assess the limits of protectability in a work of authorship, recognizing that such limits could traverse literal text and the like. Indeed, if protectability were limited to literal text, then a "plagiarist would escape by immaterial variations." Id. at

121. The Abstractions Test, specifically targeted to analyze two plays but anticipated as applying to any work, seeks separation of unprotectable idea from protectable expression by projecting the constituent elements of a copyrighted work onto a progression of detailed-to-general discrete levels of abstraction. Id. Each transition to a higher level of abstraction corresponds to a level characterized by incrementally less detail and more generality, wherein "more and more of the incident is left out." Id.

The *Nichols* analysis provides for both literal (plagiarist copying a "block in situ") and non-literal copying (considering an "abstract of the whole") scenarios. Id. Significantly, Judge Learned Hand articulated that whether sufficient protectable expression has been copied to be "substantial" should be analyzed in view of a copyrighted work taken as a Gestalt: the substantiality of protectable

expression should be assessed in the context of the underlying "skeleton" or structure which "pervades and supports" the copyrighted work." Id.

This Court, although not explicitly referring to the Abstractions Test, appeared to analyze the elements of a business white pages on a Nichols-like basis in deciding *Feist Publs., Inc. v. Rural Tel. Service Co.*, 111 S. Ct. 1282. That is, Justice O'Connor articulated her analysis of the scope of protectability to be accorded the white pages in terms of elements which may be broken down thus: (1) the type of information reported about each telephone subscriber; (2) the ordering of this information for each subscriber; (3) the ordering of subscribers in a telephone directory; and (3) the factual information, *per se*. This Court, applying traditional doctrines of copyright law, after terminating the ill-founded "sweat of the brow" doctrine, Id. at 1292-1293, held that a

creative spark was missing from the garden variety compilation inherent in a telephone listing. Id at 1297. In an effort to invoke the *Nichols* Abstractions Test to properly decide particular fact situations populating the copyright law landscape, the various circuits, however, appear to have followed different paths which has resulted in uneven and legally unsound decisions.

The Fifth Circuit in deciding the instant case, has inadvertently granted K-T a monopoly over virtually all models of the Vroom-Yetton theory, to the extent that K-T may preclude LSI and similarly situated members of the public from using the heart and sole definitions, processes or problem attributes inherent therein. Recognizing that "the line between idea and expression is hard to draw," the *Kepner-Tregoe Court* states that "in a close case [] a court may have to filter out ideas, processes, facts, idea/expression

mergers, and other unprotectable elements of plaintiff's copyrighted materials to ascertain whether the defendant infringed protectable elements []." But the court noted that a rigorous copyrightability scope analysis was not necessary in this case because of the identity of "organization and language" between K-T's copyrighted training materials and LSI's MPO computer program, both, of course, describing the Vroom-Yetton theory and models of participative management. Application of the proper standard and test for copyright infringement — including an abstractions analysis showing the relationship between the literal definitional language in issue and its impact upon use in the training materials treated as a Gestalt — would have shown the Fifth Circuit that preventing the public from using necessary incidents of a theory, an idea, a concept, a process, a model, clearly contravenes the scope of copyright law and inhibits the progress of the useful arts and science.

The Tenth Circuit recently considered a somewhat similar fact situation in the case of *Autoskill*, 26 U.S.P.Q.2d 1828 . Unlike the instant case, the *Autoskill Court* expressly applied the Nichols Abstraction Test, observing that it "mirrors" the top-down implementation processes used to develop computer programs — from functional analysis to design to coding. Id. at 1839, n.18. Not surprisingly, the Tenth Circuit properly held that extending protection for three subtypes of students with reading difficulties (types O, A and S) would "grant Autoskill a virtual monopoly over those concepts and serve to thwart efforts of others to build upon them." Id. at 1840, trial court citing to *Feist*, 111 S. Ct. at 1290.

Furthermore, the *Autoskill Court* reasoned that, as unfortunately occurred to LSI and its principals, "the identification of those subtypes by researchers would be of

little value [] if such theories were not allowed practical application." Id. The Tenth Circuit, following the suggestion of the Second Circuit, observed that to arrive at a legally correct result on such facts merely requires a workable blueprint of a program's overall structure, not necessarily a painfully detailed blueprint of its structure. Id., citing, *Computer Assoc. Int'l, Inc. v. Altai Inc.*, 982 F.2d 693, 714 (2nd Cir. 1992). At each level of abstraction, expressive elements of the copyrighted work were viewed through a legal filter to see if any such expression should be excluded from further substantial similarity consideration on the basis of pertinent "traditional" copyright doctrines. Id. Thus, the infringement standard and test invoked by the Tenth Circuit, adapting the abstraction-filtration-comparison analysis of the Second Circuit, appears to correctly assess the protectability of constituent expressive elements, but fails to evaluate the substantiality of any and all protectable elements in the

context of the work as a whole.

The Second Circuit announced and applied this abstraction-filter-comparison test to ascertain the scope of copyright protection for a computer program:

> [A] court would first break down the allegedly infringed program into its constituent structural parts. Then, by examining each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, a court would then be able to sift out all non-protectable materials. Left with a kernel, or possibly kernels, of creative expression after following this process of elimination, the court's last step would be to compare this material with the structure of the

> allegedly infringing program. The result of this comparison will determine whether the protectable elements of programs at issue are substantially similar so as to warrant a finding of infringement.

Computer Assoc., 982 F.2d at 693. Thus, the Altai Court, after establishing a hierarchy of elements which populate a series of levels of abstraction, proceeded to filter out from the various expressive elements those elements which failed to pass traditional copyright doctrines and/or which were dictated either by internal operational or efficiency considerations, or by external market forces. But then, in its third step, instead of considering the protectability to be accorded a computer program as a whole in view of the remaining protectable elements contained therein, the *Altai* test would analyze each of these protectable elements on an individual basis.

This approach fails to compare the accused work taken as a whole with the copyrighted work taken as a whole. Making a comparison the *Altai* way is clearly not statutorily correct: the scope of protection to be accorded a copyrighted work is limited by its protectable elements, but these protectable elements must not be segregated from the copyrighted work. A copyrighted work has been created as a Gestalt and its integrity in that context must be sustained for the purposes of substantial similarity analysis. This should be true regardless of the nature of the work and, of course, regardless of the circuit in which a case is being decided.

The Tenth Circuit, deciding another copyright infringement case involving two competing computer programs which aided customers select replacement industrial belts, recognized that copyright infringement analysis does not end with a finding of copied portions of a copyrighted

work, but must determine whether such copied portions are protectable under the copyright statutes. *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823, 834 (10th Cir. 1993), citing *Baker*, 101 U.S. at 101-103 and *Feist*, 111 S. Ct. at 1289. Indeed, this circuit court correctly reasoned that:

> Accordingly, in order to impose liability for copyright infringement, the court must find that the defendant copied protectable elements of the plaintiff's program and that those protectable elements comprise a substantial part of the plaintiff's program when it is considered as a whole.

Gates Rubber, 9 F.3d at 834-835 (citations omitted).

The *Gates Rubber* Court announced that it would conduct the requisite protectability and infringement analysis

using, "in substantial part," the "Abstraction-Filtration-Comparison" test applied in its *Autoskill* decision 994 F.2d at 1487-98. Since the mathematical formulas and algorithms contained in Gates Rubber's engineering module of its computer program appear to be characterized as "process" by the trial court, the Tenth Circuit remanded for clarification of the scope of protectability analysis, including due consideration for filtering out unprotectable elements based upon settled copyright doctrine including process-expression dichotomy, merger and scenes a faire. Id.

Construing the Abstractions Test differently from the Second and Tenth Circuits, the Third Circuit announced and applied a "structure, sequence and organization" test to ascertain the scope of copyright protection for a computer program. *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3rd Cir. 1986), cert. denied, 479 U.S. 1031.

The Whelan Court properly seeing problems with the proper standard to apply in an infringement analysis implicating scope of protection issues, unfortunately, arrived at the ill-founded holding that "*the purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea.* Id. at 1236 (emphasis original). The Third Circuit then concluded that "copyright protection of computer programs may extend beyond the program's literal code to their structure, sequence, and organization." Id. at 1248. The *Whelan* rather simplistic test has not been embraced by any other circuit. See, e.g., *Plains Cotton Coop. Assoc. v. Goodpasture Computer Service, Inc.*, 807 F.2d 1256 (5th Cir.), cert. denied, 108 S.Ct. 80 (1987) and *Computer Assoc.*, 982 F.2d at 1251-1252.

The Ninth Circuit, in *Sega Enterprises Ltd. v.*

Accolade, Inc., because of the hybrid nature of computer programs, acknowledged that there was no settled standard for identifying protectable expression, echoed the observation of the *Altai Court* that "[t]hus far, many of the decisions in this area reflect the courts' attempt to fit the proverbial square peg in a round hole." 977 F.2d 1510 (9th Cir. 1992). The Ninth Circuit rejected the Whelan approach and applauded the Second Circuit's approach of breaking down a computer program into its component subroutines and sub-subroutines and then identifying the idea or core functional element of each. Id. at 1513.

The First Circuit, addressing the protectability to be afforded a copyrighted set of rules for a sales promotional (sweepstakes) contest has held that "the subject matter would be appropriated by permitting the copyrighting of its expression." *Morrissey v. The Procter & Gamble Company*,

379 F.2d 675, 679 (1st Cir. 1967). Since the rules "sprung directly from the substance" of the contest, the *Morrissey Court* regarded these rules as being a necessary incident of communicating the sweepstakes to the public. Id. at 678, citing *Baker*, 101 U.S. 99. The First Circuit appreciated that, unfortunately as has become the situation in the early 1990's particularly regarding protectability decisions involving copyrighted computer software, "We cannot recognize copyright as a game of chess in which the public can be checkmated." *Morrissey*, 379 F.2d at 679.

This anomalous situation regarding a standard for assessing the scope of copyright protection is typified by the controversy between Lotus Development Corporation and Borland International wherein Lotus has filed a complaint for copyright infringement against Borland. Judge Keeton, in a series of rulings, found that Borland's Quattro Pro

spreadsheet computer software has been found to infringe upon Lotus' copyrighted 1-2-3 spreadsheet computer software in several respects. *Lotus Dev. Corp. v. Borland Int'l*, 788 F. Supp. 78 (D.Mass 1992); 799 F. Supp. 203 (D.Mass 1992); 831 F. Supp. 202 (D.Mass 1993); and 831 F. Supp. 223 (D.Mass 1993). Applying his own standard for copyright infringement, Judge Keeton has added contours to the protectability landscape.

Minimally, a bright line from this Court is needed to restore order to the scope of copyright protectability landscape.

C. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT MERE ABBREVIATIONS MERITED COPYRIGHT PROTECTION

The Fifth Circuit erroneously upheld the trial court's

holding that the abbreviations of the core processes of the Vroom-Yetton theory are protectable by copyright. By following through on its ill-founded decision, the Fifth Circuit agreed with the trial court that the abbreviations "AI" and "AII" — corresponding to **A**utocratic processes, "CI" and "CII" — corresponding to **C**onsulting processes, and "GII" — corresponding to **G**roup processes, are copyrightable and therefore protectable under the copyright statutes. That abbreviations are not protectable by copyright may be readily ascertained under 37 *C.F.R.* § 202.1 wherein material not subject to copyright is enumerated. In particular, this federal regulation recites as examples of materials which are not subject to copyright and for which applications for copyright registration should not be entertained, "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;"

37 *C.F.R.* § 202.1(a).

This preclusion of short expressions from copyrightability is also echoed in Copyright Office Circular 34 entitled "Copyright Protection Not Available for Names, Title, or Short Phrases." App. F. Circular 34 enumerates several examples which frequently include abbreviations such as catchwords, catch phrases and short advertising expressions. Abbreviations, of course, fall at the bottom of the fragmentary word threshold. The threshold for originality, in the instance of textual works of authorship, transcends fragmentary words or phrases, or forms of expression dictated solely by functional considerations. Melville B. Nimmer and David Nimmer, 1 *Nimmer on Copyright* § 2.01[B] at 2-16 (Mathew Bender 12/93).

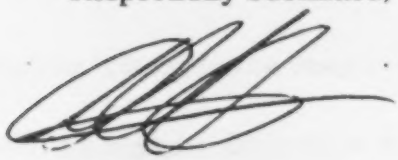
This Court has held that to merit protection by

copyright, any element of a work must serve "some purpose other than a mere advertisement or designation of the subject to which it is attached." *Higgins v. Keuffel*, 140 U.S. 428, 431, 11 S. Ct. 731, 732 (1891). The use of the instant abbreviations is inherently necessary to merely designate basic participative management processes referenced in the Vroom-Yetton model, or improvements thereof, regardless of whether such designation is invoked by K-T, LSI or anyone else. Accordingly, the Fifth Circuit misapprehended copyright law and impermissibly accorded copyright protection to these purely functional abbreviations.

CONCLUSION

For the foregoing reasons, LSI respectfully requests that this court grant a Writ of Certiorari reviewing the Fifth Circuit's decision.

Respectfully Submitted,



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APPENDIX

KEPNER-TREGOE, INC.,
Plaintiff-Appellee,

v.

LEADERSHIP SOFTWARE, INC.,
Defendant-Appellant.

No. 92-2481.

United States Court of Appeals,
Fifth Circuit.

Feb. 2, 1994.

Holder of exclusive license to copyrighted management training materials called "Leadership and Decision Making Cases and Manuals for use in Leadership Training" brought infringement action against developer of computer program called "Managing Participation in Organization." The United States District Court for the Southern District of Texas, Melinda Harmon, J., entered permanent injunction against distribution of program and modifications thereof, and awarded $46,000 in damages in favor of holder. Developer appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) program infringed copyright; (2) modified program infringed copyright; and (3) District Court lacked authority to enjoin generically all future modifications of program.

Affirmed as modified.

Appeal from the United States District Court for the Southern District of Texas.

Before JOHNSON, WIENER, and DeMOSS, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-appellee Kepner-Tregoe, Inc. (K-T) won a permanent injunction and damages against Defendant-Appellant Leadership Software, Inc. (LSI) in a suit complaining that LSI's computer program infringed K-T's exclusive license to copyrighted management training materials. LSI appeals, raising issues touching on both copyright law and the Federal Rules of Evidence. We modify in part the ruling of the district court and, as modified, affirm.

I.

FACTS AND PROCEEDINGS

K-T sued LSI alleging that LSI's computer program called "Managing Participation in Organization" (MPO) infringed copyrighted materials (Licensed Materials) that Professor Vroom, a 50% owner of LSI, had exclusively licensed to K-T in a 1972 agreement (the Agreement). Prior to trial, K-T secured a temporary restraining order and a preliminary injunction prohibiting LSI from manufacturing, distributing, or selling the MPO computer program. In a bench trial, the district court found in favor of K-T and entered a permanent injunction against LSI's distribution of the MPO program. The court also awarded K-T damages in the amount of $46,000.

Significantly, the court enjoined distribution of (1) the original MPO program, (2) a modified MPO program that LSI produced in an effort to remove just the infringing language, and—seemingly—(3) all future modifications and revisions of MPO. The court also awarded K-T attorneys fees, costs, and interest. LSI timely appealed, asserting that the court erred with respect to both its application of copyright law and its evidentiary rulings.

K–T, a Maryland corporation with its principal place of business in Princeton, conducts management training seminars. LSI, a Texas corporation with its principal place of business in the Houston area, sells the MPO computer program, which was developed by Professors Vroom and Jago, the equal owners of LSI. Jago was a named defendant in the district court proceedings, but K–T could not compel Vroom's attendance at trial in Houston because he resides in Connecticut. Neither Vroom nor Jago is a party to this appeal.

In 1972, K–T signed the Agreement, by which it acquired an exclusive international license to copyrighted materials entitled *Leadership and Decision Making Cases and Manuals for use in Leadership Training.* In consideration for this exclusive license K–T paid the authors—Professor Vroom and his former colleague, Professor Yetton—more than $400,000 in royalties over several years. K–T ultimately bought out the license for an additional, one-time payment of $100,000.

The Licensed Materials comprise a management decision-making model called the Vroom–Yetton Model (V–Y Model) and include descriptions of management problems, explanations of management decision-making styles, flow charts presenting decision-making possibilities, and rules designed to help managers make the best decisions.

Among the copyrighted materials that were exclusively licensed to K–T are eight "questions" or "problem attributes" and five "definitions" or "processes." These questions and processes are the core of the V–Y Model. The questions prompt managers to evaluate their decision-making landscape.

1. K–T's willingness to undertake negotiations with Jago to buy a license for MPO need not reflect any doubt about the protectability of the materials K–T licensed under the Agreement. Clearly MPO contains some original

Vroom and Jago kept key K–T personnel apprised of their work on the MPO program. In 1987, Vroom and Jago incorporated LSI to market the MPO program. Shortly thereafter, K–T initiated negotiations to reach a licensing agreement covering the program; these negotiations failed.[1] In 1990, K–T learned that LSI had been selling copies of the MPO program. K–T commenced this lawsuit almost immediately, alleging that MPO infringed the copyright covering its Licensed Materials. Although K–T became entitled to copyright protection through an

elements that may have interested K–T. But MPO also clearly contains significant amounts of text that is substantially similar to portions of the materials licensed to K–T.

For example, one question asks if the manager has adequate information to make a good decision himself. The five definitions or processes describe various decision-making approaches, from autocratic (the manager alone) to more democratic (decisions requiring consensus). Presumably, the V–Y Model rules tell a manager which decision-making process to use in a given context, based on the manager's responses to the eight questions.

In 1983, Professor Jago—working closely with Vroom—created the MPO computer program. The MPO program retains the same eight questions and five processes that comprise the V–Y Model, but adds four additional questions. The MPO program also evidently processes the information generated by the questions differently, and presumably tells managers which decision-making process to adopt, without forcing them to consult flow charts and elaborate decision-making rules. The organization and language of the five processes and eight questions is virtually identical in K–T's Licensed Materials and the MPO program.

exclusive licensing agreement, this appeal is not about licensing arrangements. Rather, this is a straightforward copyright case.

II.

ANALYSIS

On appeal LSI contends that the district court erred both in its application of copyright law and in its evidentiary rulings. We consider each topic in turn.

A. *Copyright Issues*

Concluding that LSI's MPO program infringed K-T's Licensed Materials, the district court awarded K-T damages and enjoined LSI from "further copying, producing, distributing, and/or selling the MPO program." The court also concluded that a modified version of the MPO program infringed K-T's Licensed Materials. This modified MPO program resulted from LSI's efforts to remove all infringing language from the original MPO program. The injunction covers this modified program too.

Finally, the court enjoined all future modifications and improvements of the MPO program. For clarity, these programs—(1) the MPO program, (2) the modified MPO program, and (3) all future modifications of the MPO program, are discussed separately.

1. *The MPO Program*

[1] The district court concluded that LSI's MPO program infringed K–T's Li-

2. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348–49, 361–62, 111 S.Ct. 1282, 1289, 1295–96, 113 L.Ed.2d 358, 371, 379 (1991).

3. Vroom and Jago also affixed copyright warnings at the bottom of MPO screen text that displayed the definitions and processes at issue here, again reflecting their belief that such text is copyrightable.

censed Materials. To reach that conclusion, the court had to find that (1) K–T *owned* a valid copyright over the Licensed Materials, (2) LSI *copied* portions of the Licensed Materials when it made the MPO program, and (3) among the portions copied were substantial *protectable* elements of the Licensed Materials.[2] LSI does not contest that K–T's Licensed Materials are covered by a valid copyright. Indeed, Vroom—a 50% partner in LSI—applied to register the V–Y Model materials that were subsequently licensed to K–T, evidently reflecting his belief that those materials were the proper subject of copyright protection.[3] Rather, LSI insists that (1) K–T failed to prove that LSI had actually copied K–T's licensed materials, and (2) the court erred in extending copyright protection to *inherently unprotectable* elements of K–T's materials.

a. *Proof of Actual Copying*

LSI argues that the district court erred in finding that it had actually copied K-T's Licensed Materials, rather than copying other materials—possessed by third parties—that contained the same information. We find this argument to be without merit.

[2-4] As direct evidence of copying is uncommon, plaintiffs generally demonstrate copyright infringement indirectly or inferentially by proving that (1) defendants had access to the copyrighted works, and (2) there is a substantial similarity between infringed and infringing works.[4] These copy-

4. *Plains Cotton Co-op. Ass'n v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1260 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed.2d 42 (1987); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981); *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir.1978); *accord Autoskill, Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1489 (10th Cir.), *cert.*

right issues of *access* and *substantial similarity* are findings of fact and are consequently reviewed under the clearly erroneous standard.[5] In this case, the district court found that both Vroom and Jago had access to the Licensed Materials. As Vroom helped develop and write those materials, and as Jago relied on them in developing the MPO program, that finding is not clearly erroneous. Indeed, it is factually correct.

[5, 6] LSI, however, insists that K–T never demonstrated that LSI literally copied the specific materials that were licensed to K–T. But LSI's dogged insistence is nonsensical. Even if LSI did lift the offending expression from third party sources, its reproduction of that expression for commercial purposes may be infringing. Language copied from those third party sources was itself copied or derived from K–T's Licensed Materials, and its legality depends on copyright law. In other words, even if LSI copied a copy of K–T's Licensed Materials, such copying may still constitute infringement. Copying a copy of copyrighted materials is a cognizable contravention of the Copyright Code.[6]

[7] LSI does not dispute that there is substantial similarity between the MPO program and K–T's Licensed Materials. Indeed, LSI admits that the MPO program incorporates the same eight questions and five processes that the district court characterized as the "heart and soul" of the V–Y Model, which was licensed to K–T. Thus, the district court's finding that MPO is substantially similar to K–T's Licensed Materials is not clearly erroneous. In summary, neither the district court's finding that LSI had *access* to K–T's Licensed Materials, nor its finding that MPO program was substantially similar to those materials is clearly erroneous. Consequently, the district court's finding that LSI copied K–T's Licensed Materials is not clearly erroneous.

denied, — U.S. —, 114 S.Ct. 307, 126 L.Ed.2d 254 (1993).

5. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1108–09 (5th Cir.1991) (indicating that a "district court's determination concerning copying" is reviewed under the clearly erroneous standard); *accord McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 318 (9th Cir.1987).

6. *See, e.g., Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1074 (2d Cir.1992) ("access through a third party is legally sufficient").

7. *See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348–49, 111

b. *Protectable and Unprotectable Elements of K-T's Copyrighted Materials*

[8, 9] LSI argues nonetheless that the portions of K-T's licensed materials that it allegedly copied are but *unprotectable ideas* or facts, and that the district court therefore erred in holding that LSI infringed K-T's copyright. LSI is correct that the mere fact that K-T's Licensed Materials are copyrighted does not mean that all aspects of those materials are automatically protected.[7] Specifically, LSI rightly observes that copyright law protects tangible, original expressions of ideas, not ideas themselves.[8] "[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."[9] Thus, if we

S.Ct. 1282, 1289, 113 L.Ed.2d 358, 371 (1991).

8. Copyright Act of 1976, 17 U.S.C. § 102(a), (b); *see also Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir.1992).

9. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 105 S.Ct. 2218, 2224, 85 L.Ed.2d 588, 599 (1985); *see also* The Copyright Act of 1976, 17 U.S.C. § 102(b).

conclude that LSI only copied unprotectable elements of K–T's materials, we must reverse the district court's judgment.

[10, 11] Unfortunately, the line between idea and expression is hard to draw. Additionally, when an idea can be expressed in very few ways, copyright law does not protect that expression, because doing so would confer a *de facto* monopoly over the idea. In such cases the idea and expression are said to be merged.[10] To determine the scope of copyright protection in a close case, therefore, a court may have to filter out ideas, processes, facts, idea/expression mergers, and other unprotectable elements of plaintiff's copyrighted materials to ascertain whether the defendant infringed protectable elements of those materials. In this case, however, we disagree with LSI's contention that such a filtration process leads to the conclusion that the district court erred in finding that LSI's MPO program infringed K–T's Licensed Materials.

[12, 13] Although there is no evidence that the district court undertook a rigorous "abstraction-filtration-comparison" analysis of the sort approved by courts for sophisticated treatment of copyright cases,[11] such an analysis was not absolutely necessary here. The district court carefully juxtaposed selections from K-T's Licensed Materials with selections from the MPO program, thereby demonstrating a damning similarity—nay

10. *Mason v. Montgomery Data, Inc.*, 967 F.2d at 138.

11. *See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir.1992).

12. LSI inadvertently conceded that the questions and processes that comprise the V-Y Model can be written in several ways when it undertook to create a modified MPO program that was devoid of infringing language. LSI did this—of course—by selecting alternative

identity—of organization and language. This comparison of literal language or expression provided strong evidence for the court's finding that the MPO program infringed K–T's Licensed Materials.

[14, 15] Seizing upon the court's statement that the questions and processes of the Vroom–Yetton model are its "heart and soul," LSI argues that these elements are "inherent in the leadership management theory . . . of the Vroom models," implying that questions and processes that comprise the V–Y Model are unprotectable ideas. LSI contends that there is no protectable expression remaining in K–T's licensed materials, once all unprotectable elements are filtered out. But this is absurd.

Each question and process in the V–Y Model is presented in a paragraph of text. There are countless ways of expressing the content of each paragraph,[12] so there was no need for the MPO screen text to copy exactly the language of K–T's materials. Even if each of the eight questions and five processes conveys *unprotectable ideas*, the specific words, phrases, and sentences selected to convey those ideas are *protectable expression* under any reasonable abstraction analysis. As LSI's MPO program copied those words, phrases, and sentences *verbatim*, we conclude that—far from being clearly erroneous—the district court's finding that the MPO program infringed K–T's Licensed Materials was correct and must be affirmed.[13]

formulations or expressions of the same questions and processes, thereby proving that alternative expressions were possible. Unfortunately, LSI's did not change the expression enough to escape infringement.

13. K–T is also correct that *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067 (2d Cir.1992), supports a finding of infringement. LSI argues that the court in *Arica* juxtaposed selections of disputed text—just as the district court did in

2. *The Modified MPO Program*

The district court also concluded that LSI's modified MPO program infringed K–T's Licensed Materials. As noted above, the modified MPO program was the end result of LSI's surgical efforts to remove only the infringing language from the original MPO program. As this effort was partially successful, we cannot affirm the district court's conclusion that the modified MPO program infringes K–T's copyright merely by making a cursory comparison of the modified MPO program's language with that of K–T's materials.

[16] As with the original MPO program, there is no doubt that LSI copied K–T's materials in creating its modified MPO program. As noted above, evidence of LSI access to K–T's materials and the substantial similarity of the original MPO program overwhelmingly suggest copying. The same is true for the modified MPO program, which is just a *post factum* rearrangement of the original MPO program, itself a wholesale plagiarism of the definitions and processes that were licensed to K–T. Our finding of copying does not, however, lead automatically to

this case—and found that "copyright protection does not attach" to such passages. But this is an inaccurate statement of the holding in *Arica*. The court in *Arica* found that the compared passages "pass[ed] the substantial similarity threshold." *Arica*, 970 F.2d at 1074. The court thus probably would have found infringement had it not held that the defendant was entitled to a *fair use* defense.

14. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348–49, 111 S.Ct. 1282, 1289, 113 L.Ed.2d 358, 371 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected"); *Baker v. Selden*, 101 U.S. 99, 101–03, 25 L.Ed. 841 (1879) (liability for copyright infringement only obtains where

the conclusion of infringement: the question remains whether LSI's modified MPO program copied any *protectable* elements of K–T's Licensed Materials.[14] We conclude that it did.

[17, 18] The main purpose or function of K–T's Licensed Materials is to teach managers how to analyze their own decision making, and how to make the best decision in each decision-making context. Clearly this basic idea of a management training program is unprotectable.[15] Likewise unprotectable is the more specific idea of training managers by asking them a series of questions about their decision-making landscape, and then—based on their answers—suggesting a preferred decision-making process.

[19] At the other end of the abstraction spectrum, the specific words, phrases, and sentences used to formulate the questions and processes clearly constitute protected expression.[16] But the intermediate levels of abstraction, consisting of such factors as the structure, sequence, and organization of a copyrighted work, are more problematic: courts' judgments about the protectability *vel non* of such elements are inevitably *ad hoc*

protected elements of a work are copied); *accord Autoskill, Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1496–98 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 307, 126 L.Ed.2d 254 (1993); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475–77 (9th Cir.), *cert. denied sub nom. B.B. Asset Management, Inc. v. Symantec Corp.*, — U.S. ——, 113 S.Ct. 198, 121 L.Ed.2d 141 (1992).

15. *See, e.g., Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236–38 (3d Cir.1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 877, 93 L.Ed.2d 831 (1987).

16. *See, e.g., The Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823, 836 (10th Cir.1993).

and fact specific.[17] In this case, we conclude that the modified MPO program copied substantial protectable elements of K–T's Licensed Materials and thus infringed K–T's copyright.

Like the district court, we are unimpressed by LSI's shallow efforts to remove the infringing language from the MPO program. Although it is true that the modified MPO program does not identically trace the language of the definitions and processes contained in K–T's Licensed Materials (as did the original MPO program), the modified MPO program's language is still substantially similar to that of K–T's materials. True, "you solve the problem yourself" has been replaced with "you reach a solution alone." And "you consult one-to-one with those that report to you" replaces "you share the problem with relevant subordinates." But such modifications do not completely dispel the similarity of expression shared by infringed and infringing materials.

LSI argues that the modified MPO program is merely substantially similar to unprotectable conceptual elements of K–T's materials, that the modified MPO program communicates the same concepts as K–T's Licensed Materials, but with different expression. We disagree.

As an analogy, consider the familiar quote from *Romeo and Juliet:* "O Romeo, Romeo! wherefore art thou Romeo?" [18] Reformulating this quote in a manner analogous to LSI's modification of K–T's copyrighted language, we might write: "Ah Romeo, Romeo! Why did you have to be born Romeo?" Are these two quotes alike only in conceptual substance? Obviously not! Yes, they both

17. *Id.*

18. William Shakespeare, *Romeo and Juliet* act II, sc. 2.

express the same concept: why did Juliet have to fall in love with Romeo, scion of Montague—her family's bitterest foe? But they are also quite alike in expression. They are not identical, but they are alike. Both sentences embrace the dramatic repetition of Romeo's name. Both sentences are phrased as questions. Both have the quality of a sigh: the gasping resignation of a woman marvelling at the fateful irony of life. Although the two sentences are not identical, they are manifestly similar in *expression*, as well as in conceptual content.

The language of LSI's modified MPO program is likewise similar to that of K–T's materials: their paragraphs are about the same size, their phrases are similar, their ideas are presented in the same order; in short, parts of the modified MPO program are but a transparent, syntactic rearrangement of portions of K–T's copyrighted materials. While no longer identical to those materials, the modified MPO program still bears many telltale signs of its origins. It is still a copy—still a child of infringement.

[20, 21] Additionally, we conclude that the modified MPO program infringes upon elements of K-T's materials, which—although existing at a higher level of organizational abstraction—are nonetheless protectable under copyright law. As we have noted, generalizing about the degree of copyright protection owed to intermediate levels of abstraction, such as the structure, sequence, and organization of copyrighted works, is difficult. A fairly broad consensus has emerged, however, that such non-literal elements of computer programs and other copyrightable works may be protected.[19] Gener-

19. *See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702–03 (2d Cir. 1992); *Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d at 1236–38; *Lotus*

ally speaking, then, we join that consensus.[20]

[22] LSI argues that the V–Y Model, which was described in the materials licensed to K–T, amounts to a law of nature like Newton's Law of Gravitation, the constant π (for discussing the geometry of circles and spheres) or Einstein's $E = MC^2$. Specifically, LSI contends that the eight definitions and five processes that comprise the V–Y Model are fundamental, ineluctable aspects of a managerial relationship—that intelligent discussion of managerial decision-making is impossible without specific reference to these universal definitions and processes. Although there is a kernel of truth in this assertion, it is a small kernel: in the main, we disagree with this LSI's self-aggrandizing characterization of the V–Y Model.

Dev. Corp. v. Paperback Software Int'l, 740 F.Supp. 37 (D.Mass.1990).

20. We do not purport to define the precise scope of copyright protection for non-literal elements of copyrighted works in this case. We note in passing, however, that our statements are not inconsistent with *Plains Cotton Cooperative Assoc. v. Goodpasture Computer Serv. Inc.*, 807 F.2d 1256 (5th Cir.1987). In that case we upheld the district court's denial of a *preliminary injunction* against an alleged infringer of a computer program because the copyright holder had failed to demonstrate a substantial likelihood of success on the merits. In *Plains Cotton*, we declined to embrace the broad scope of copyright protection for computer programs announced in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir.1986), but not because we wanted to restrict copyright protection to the literal text of copyrighted works. Rather, we declined to embrace *Whelan* because (1) we were reviewing a motion for preliminary injunction and thus were "one step removed from the merits of the case," 807 F.2d at 1262, (2) the record was—in consequence—only partially developed, and (3) the sequence and organization of the allegedly infringing program were dictated by externalities of the cotton market, thus implicating the *scenes a faire* doctrine. 807 F.2d at

[23] Some unprotectable fundamental concepts are undoubtedly buried in the definitions and processes of the V–Y Model. For example, the idea that a manager can make a decision without consulting his subordinates is unprotectable: it is simply one of the relational possibilities that exist between managers and subordinates. As noted above, however, the specific ways that the questions and processes are formulated—the exact words, phrases, and sentences used to describe decision-making processes or questions—are protectable expression. And other, more abstract organizing principles of the V–Y Model are protectable as well.

In dissecting the problems of management decision-making into five processes and eight questions, Vroom and Yetton unquestionably originated a useful model of managerial deci-

1262; *see also The Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823, 838 (10th Cir.1993) (for a general discussion of the *scenes a faire* doctrine). Our analysis of this case thus does not conflict with our decision in *Plains Cotton*.

Neither did our citation—in *Plains Cotton*—to *Synercom Technology, Inc. v. University Computing Co.*, 462 F.Supp. 1003 (N.D.Tex. 1978), reflect an intention generally to restrict copyright protection to the literal text of copyrighted works. *Synercom*, a district court case, is binding neither in its legal holding nor by compelling factual analogy. Consequently, we need not embark on a full analysis of that case, and we refrain from so doing. All that we do here is embrace the general, noncontroversial proposition that non-literal aspects of copyrighted works—like structure, sequence, and organization—*may* be protected under copyright law: a proposition that has been approved by Supreme Court precedent. *See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (indicating that the *selection* and *arrangement*—i.e., the *organization*—of facts may be protected under copyright law.

sion-making. Yet they obviously did not discover the single, unique, unavoidable description of human managerial relations. In creating the MPO program, for example, Jago added four more questions to the eight that were part of the V–Y Model. Such an expansion of the original theory indicates that the first eight questions did not exhaustively and uniquely portray human management relations.

Close analysis of the V–Y processes and questions reveals that the ideas they encapsulate can be packaged in different ways. For example, one process (designated AII) instructs a manager to gather information from subordinates, then make the relevant management decision himself. The process states that the manager "may or may not tell subordinates" the nature of the problem in getting information from them. This makes two separate logical possibilities, so this process could—in a different model—be broken into two different processes. In short, not only does the V–Y Model fail to describe all conceivable features of the management decision-making landscape, it also fails to organize and package its managerial truisms in a single, unique, ineluctable way: there are many ways of organizing those same insights.

This point is driven home by examining the way different processes and questions are designated in the V-Y Model. The five processes of that model are designated respectively AI, AII, CI, CII, and GII. How did LSI designate the five processes of its modified—and putatively non-infringing—MPO program? Not surprisingly, AI, AII, CI, CII, and GII. Are these designations fundamental constants supplied by nature, like T for a circle or Plank's constant in

21. Such technical infringement, however, is not entitled to a remedy unless it is substantial.

quantum physics? Clearly not, they are arbitrarily selected characters: the V–T Model would work just as well if its processes were designated a, b, c, d, and e! These features of the V–Y Model are thus original, protectable expression, not fundamental constants of nature; and LSI's copying of these features—and other related features—is thus technically infringing.[21]

LSI obviously uses V–Y Model designations in its modified MPO program, and does so intentionally. The V–Y Model has been wildly successful, and the MPO program could benefit from that success by incorporating recognizable, original expression from the V–Y Model, whether that expression is the *verbatim* formulation of questions and processes, the organization of the model, or the arbitrary designations of the model's constituent parts. But the MPO program is not supposed to benefit from such incorporation. It was precisely the right to benefit from such copying that Vroom and Yetton licensed *exclusively* to K–T for half a million dollars.

[24, 25] LSI attempts to obscure this point by noting that the V–Y Model is reproduced, discussed, and described all over the United States, suggesting that the V–Y Model is thus in the *public domain* and therefore unprotectable. But protected expression does not lose its protection simply because it is widely disseminated. If the V–Y Model is widely discussed, described, and reproduced, it is presumably with the permission of the copyright holder. Alternatively, it is because such discussion, description, and reproduction constitutes *fair use*.[22] "[F]air use of a copyrighted work . . . for purposes such as criticism, comment, new reporting, teaching (including multiple copies for classroom use),

22. The Copyright Act of 1976, 17 U.S.C. § 107.

scholarship, or research, is not an infringement of copyright." [23] Conspicuously absent from the list of fair uses is use for commercial purposes, which is exactly the sort of use LSI wants us to approve.

[26] When Vroom and Yetton sold K-T an exclusive license to copyrighted materials, which included the V-Y Model, they signed away the right to copy, at least for commercial purposes, protectable elements of the V-Y Model. LSI may not now incorporate substantially similar expression into computer programs for commercial sale: it was precisely the right to make such commercial use of the V-Y Model that Vroom and Yetton sold to K-T for hundreds of thousands of dollars.

In summary, we conclude that the district court did not err in holding that the modified MPO program infringed K-T's Licensed Materials. As LSI was partially successful in removing infringing expression from the MPO program, the judgment that the modified MPO program infringes K-T's copyright is a fairly close one. Nonetheless, we agree with the district court that, although the modified MPO program does not identically trace the language of the definitions and processes delineated in K-T's Licensed Materials, it infringes substantial portions of the

23. *Id.*

24. The court probably based its expansive language on the 1972 Agreement, which grants K-T exclusive rights to all "modifications of and improvements to" its licensed materials. But the Agreement probably cannot be read as conferring any more rights upon K-T than are provided by copyright law, because the Copyright Act preempts all legal and equitable rights that fall within the scope of copyright law. *See Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir.1988) (holding that software licensing agreements made in accordance with the Louisiana Software License Enforcement Act were nugato-

ry, because the relevant portions of the Louisiana Act were preempted by the Copyright Act of 1976).

Moreover, even if this preemption argument were wrong, a court would still have to decide what constitutes a modification or improvement under the Agreement, before it could evaluate whether future programs infringe K–T's copyright. The most obvious construction of these terms is that they have the meaning ascribed to them by copyright law. In any case, at oral argument the parties acknowledged that this case does not concern the coverage of the Licensing Agreement: those issues are being litigated in another jurisdiction.

protected expression contained in those materials.

3. *All Future Modifications of the MPO Program*

[27, 28] We are uncertain whether the district court really intended to enjoin all future modifications of the MPO program, and if so, what it meant by such an injunction. The court's language in its Findings of Fact and Conclusions of Law is certainly broad enough to suggest that it enjoined all future modifications and improvements of the MPO program. But the Judgment obscures the court's intentions by enjoining all "modifications [of MPO] . . . which are the subject of the Temporary Restraining Order (TRO) issued March 15, 1990," because no MPO modifications were expressly the subject of the TRO. Indeed, no modifications of MPO existed at the time the TRO was entered: no legal action by K–T had yet compelled such modifications. We hold, however, that whatever the court intended in that regard, it lacked the authority to enjoin generically all future modifications of MPO. Rather, the most that it could enjoin were future modifications and improvements of MPO that are substantially similar to K–T's copyrighted Materials [24]

[29] Under copyright law, the district court could enjoin only those future versions of MPO that are substantially similar to K–T's Licensed Materials. LSI is free to continue its efforts to devise a non-infringing management training program, notwithstanding any expansive language in the district court's opinion to the contrary.[25]

B. *Evidentiary Issues*

LSI also raises a handful of evidentiary issues, none of which is meritorious. LSI contends that the district court erred in failing to recognize LSI's right to use K–T's Licensed Materials. This contention actually subsumes three arguments made by LSI: 1) that Vroom *retained* the right to continue work on the V–Y Model when he signed the Agreement with K–T, 2) that K–T's conduct indicates that it granted LSI a non-exclusive license to use its Licensed Materials, and 3) that K–T is estopped from claiming that LSI infringed its license because it encouraged and supported LSI's development of the MPO program. None of these arguments is persuasive.

[30] Both the Licensing Agreement and doctrines of copyright law (e.g. the fair use defense) give Vroom the right to continue his theoretical work on the V-Y Model.[25] But they emphatically do not give Vroom (or LSI) the right to exploit, for his commercial purposes, expression that Vroom or LSI exclusively licensed to K-T. As, this is all that the trial court held, our foregoing resolution of the copyright issues should ensure the proper balance between K-T's exclusive li-

25. In essence, copyright law creates a standing injunction against works that are substantially similar copies of protectable portions of copyrighted materials. This is the injunction to which LSI's future efforts to produce management training software are subject. Copy-

cense and Vroom's right to continue his research.

LSI refers to various expressions of encouragement and support volunteered by key K–T personnel and suggests that these expressions were "congruent with the granting [to LSI] of an implied license" to use K–T's Licensed Materials. The court rejected this argument and found that "there is no evidence that K–T had any knowledge that the program [MPO] was being sold to the public . . ." at the time that its employees offered support and encouragement for LSI's efforts. K–T's encouragement of LSI's efforts makes sense, given K–T's exclusive right to all future iterations of its Licensed Materials.

[31] The court also observed that a transfer of copyright is not valid unless in writing. LSI quibbles with the court's observation by suggesting that K-T transferred a *non-exclusive* oral license. But at trial LSI never characterized its putative license as non-exclusive. And LSI ignores the court's finding that K-T never intended to grant LSI any kind of license at all. In view of these observations, the court's finding that LSI had no license to use K-T's materials is not clearly erroneous.

[32] Finally, LSI argues that these same expressions of support estop K-T from asserting infringement of its license. The court's finding that those expressions of support pre-dated K-T's realization that MPO was being sold to the public is relevant in this context as well, and—again—that finding is not clearly erroneous. Moreover, LSI nei-

right law is the measure of whether those efforts will prove to be infringing.

26. The Agreement allows Vroom and Yetton to retain "nonassignable rights to use the licensed material for their own teaching and private consultation work."

ther cites any applicable law nor elaborates the legal elements of its estoppel argument. We therefore reiterate the admonition pronounced by Justice Holmes when he wrote: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." [27]

[33, 34] LSI also insists that the court abused its discretion by excluding evidence of K-T's knowledge, support, and encouragement of the MPO program. K-T correctly responds that LSI did not make an offer of proof, which is required for error to be predicated on the exclusion of evidence. But even if the court had thus erred, which it did not, the error would have been harmless because, again, LSI offered no evidence that K-T knew LSI was selling copies of the MPO program at the time K-T personnel were expressing their support and enthusiasm fo the program's development.

Finally, LSI argues that the court abused its discretion by admitting the 1972 Agreement over LSI's hearsay objection. LSI made its hearsay objection while K–T was trying to introduce the Agreement into evidence during its cross-examination of Jago. LSI could have objected that no proper foundation had been laid for the admission of the Agreement, but it objected on the grounds of hearsay instead. Surprisingly, both K–T and the court were thrown by this objection: the district court ultimately admitted the Agreement, saying that it did not think that the

27. *Johnson v. United States*, 163 F. 30, 31 (1908).

28. Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (1988).

29. *See, e.g., Casey v. Western Oil & Gas, Inc.*, 611 S.W.2d 676, 680 (Tex.Civ.App.—Eastland 1981, writ ref'd n.r.e.) (contracts are not "incompetent hearsay," for they are verbal acts).

30. *See, e.g., United States v. Continental Casualty Co.*, 414 F.2d 431, 434 (5th Cir.1969)

document was being "offered for the truth of the matter stated."

[35–38] The objection was—in fact—inapposite. "Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are nonhearsay."[28] A contract is a verbal act.[29] It has legal reality independent of the truth of any statement contained in it. Under the objective theory of contracts, the fact that two parties signed a contract is enough to create legal rights, whatever the signatories might have been thinking when they signed it. The admission of a contract to prove the operative fact of that contract's existence thus cannot be the subject of a valid hearsay objection.[30] To introduce a contract, a party need only authenticate it. Thus, in this case, LSI's objection to the admission of the 1972 Licensing Agreement on the grounds of hearsay was inapt.

III.

CONCLUSION

We affirm the district court in all of its evidentiary rulings and in its conclusion that the MPO program infringes copyrighted materials that were exclusively licensed to K-T under the 1972 Agreement. We also affirm the court's conclusion that the modified MPO program infringed those materials. We clarify the court's judgment, however, to the

(with verbal acts the "inquiry is not the truth of the words said, but merely whether they were said"); *Byrd Int'l of Dallas, Inc. v. Electronic Data Systems Corp.*, 629 S.W.2d 177, 179 (Tex.App.—Dallas 1982, writ ref'd n.r.e.) (when the existence of a contract constitutes a necessary part of the cause of action or is part of the ultimate issue "the utterance or writing of [the contract] is itself the fact to be proved [and] the admission of this 'verbal act' is not hearsay").

extent that it seems to enjoin all future modifications and revisions of the MPO program, regardless of whether they are substantially similar to K–T's copyrighted materials. Copyright law is the measure of whether LSI's future efforts will be infringing, and copyright law limits infringement to modifications that are substantially similar to protectable elements of infringed materials. To the extent that the district court's judgment could be read more broadly than that, we modify that judgment. As thus modified, the judgment of the district court is in all respects

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEPNER-TREGOE, INC.
a Maryland Corporation

vs. CIVIL ACTION NO. H-90-804

LEADERSHIP SOFTWARE, INC.,
a Texas Corporation, and
ARTHUR G. JAGO, an Individual

JUDGMENT

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered,

It ORDERED that a permanent injunction issue enjoining defendants Leadership Software, Inc. and Arthur G. Jago from further copying, producing, distributing, and/or selling the MPO program or any modifications therecf which are the subject of the Temporary Restraining Order issued March 15, 1990, and the MPO program modified shortly

ORDERED that a permanent injunction issue enjoining defendants Leadership Software, Inc. and Arthur G. Jago from in any way infringing copyright number A-280369 held by Kepner-Tregoe.

It is further

ORDERED that Kepner-Tregoe, Inc. recover of the defendant Leadership Software, Inc. the sum of $46,000 with interest thereon at the rate of 10% as provided by law, and its costs of action, including, pursuant to 17 U.S.C. § 505, its attorney's fees.

SIGNED at Houston, Texas, this 7th day of January, 1992.

_____

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEPNER-TREGOE, INC.
a Maryland Corporation

vs. CIVIL ACTION NO. H-90-804

LEADERSHIP SOFTWARE, INC.,
a Texas Corporation, and
ARTHUR G. JAGO, an Individual

FINDINGS OF FACT AND CONCLUSION OF LAW

This above styled and referenced lawsuit has been brought pursuant to Title 17 of the United States Code for copyright infringement. A temporary restraining order and temporary injunction were entered March 15, 1990. The merits of the case were tried to the Court beginning August 6, 1990.

Plaintiff Kepner-Tregoe, Inc. ("K-T") is a Maryland corporation with its principal place of business in Princeton, New Jersey. It specializes in the

business of conducting management training seminars. In 1972 it obtained from the authors, Victor H. Vroom and Philip W. Yetton, an exclusive international license to materials contained in a copyrighted work entitled Leadership and Decision Making Cases and Manuals for Use in Leadership Training ("Vroom/Yetton Model"), together with an exclusive license to all modifications and improvements to the original work. The Vroom/Yetton Model is registered in the Copyright Off ice under copyright registration number A-280369. Since obtaining the exclusive license K-T has paid to Mssrs. Vroom and Yetton $452,000 in royalties. In 1989 K-T bought out the license from Vroom and Yetton for a one-time payment of $100,000. Vroom received 70% of these royalties and fees.

In 1984 Victor H. Vroom and the

Defendant Arthur G. Yago [sic], an individual residing and doing business in Bellaire, Texas, published an article entitled Leadership and Decision Making: A Revised Normative Model (the "Vroom/Jago" Model"). A computer program entitled Managing Participation in Organizations (the "MPO program"), also written by Vroom and Jago, is the computerized version of the Vroom/Jago model. It is designed to be used in conjunction with a book written by Vroom and Jago entitled The New Leadership.

Vroom and Jago incorporated the Defendant Leadership Software, Inc. ("LSI"), a Texas corporation, with its principal place of business in Bellaire, Texas, in January, 1987, for the purpose of marketing the accused MPO program. Vroom and Jago each own 50% of the stock in this Subchapter S corporation.

Both the Vroom/Yetton model and the Vroom/Jago model are tools used to train managers in better ways of making decisions. Although the theory utilized by both models is an idea taught worldwide, the actual models are expressions of a method by which to make decisions.

In order to establish that the defendants infringed its copyright, K-T is required to prove that the defendants copied K-T's work. Copying can be proved not only by direct evidence, but by evidence of both access to the copyrighted work and substantial similarity of defendant's work to the copyrighted materials. Miller v. Universal City Studios, Inc. 650 F.2d 1365, 1375 (5th Cir. 1981); Novelty Textile Mills, Inc. v. Joan Fabrics Corporation, 558 F.2d 1090, 1092 (2nd Cir. 1977).

The heart of the Vroom-Yetton model includes eight questions or "problem attributes" and five definitions or "processes" (AI, AII, CI, CII, and GII). Both Vroom and Jago had access to the eight questions and five definitions of the Vroom-Yetton model at the time they wrote the MPO program.

The accused MPO program contains twelve questions or "problem attributes" and five definitions or "processes." Jago and Vroom incorporated the five definitions from the Vroom/Yetton model into the MPO program.

	VROOM/YETTON MODEL		MPO PROGRAM
AI	You solve problem of make decision yourself using information available to you at that time.	AI	You solve the problem or make the decision yourself using the information available to you at the present time.

AII You obtain necessary information from subordinate(s), then decide on solution to problem yourself. You may or may not tell subordinates what the problem is in getting the information from them. The role played by your subordinates in making the decision is clearly one of providing the necessary information to you, rather than generating or evaluating alternative solutions.

CI You share the problem with relevant subordinates individually; getting their ideas and suggestions without bringing them together as a group. Then <u>you</u> make the decision which may or may not reflect your subordinates' influence.

AII You obtain any necessary information from subordinates, then decide on a solution to the problem yourself. You may or may not tell subordinates the purpose of your questions or give information about the problem or decision on which you are working. The input provided by them is clearly in response to your request for specific information. They do not play a role in the definition of the problem or in generating or evaluating alternate solutions.

CI You share the problem with relevant subordinates individually, getting their ideas and suggestions without bringing them together as a group. Then YOU make the decision. This decision may or may not reflect your subordinates' influence.

CII You share the problem with your subordinates as a group. [sic] collectively obtaining their ideas and suggestions. Then, you make the decision which may or may not reflect your subordinates' influence.	CII You share the problem with your subordinates in a group meeting. In this meeting you obtain their ideas and suggestions. Then, YOU make the decision which may or may not reflect your subordinates' influence.
GII You share problem with your subordinates as a group. Together you generate and evaluate alternatives and attempt to reach agreement (consensus) on a solution. Your role is much like that of chairman. You do not try and influence the group to adopt "your" solution and are willing to accept and implement any solution which has the support of the entire group.	GII You share problem with your subordinates as a group. Together you generate and evaluate alternatives and attempt to reach agreement (consensus) on a solution. Your role is much like that of chairperson, coordinating the discussion, keeping it focused on the problem and making sure that the critical issues are discussed. You can provide the group with information or ideas that you have but you do not try to press them to adopt 'your' solution and you are willing to accept and implement any solution that has the support of the entire group.

The accused MPO program also contains substantially similar "questions" from the Vroom/Yetton model:

Do I have sufficient information to make a high quality decision?

This attribute refers to the extent to which you have sufficient information, skill or expertise. To solve the problem by yourself without the aid of your subordinates. The information referred to is information relevant to the technical or rational side of the problem, i.e., you are asked if you have the information needed to achieve the external objective, not the information s [sic] to what solution would most please your subordinates. Note that what is called for is a judgment about your knowledge in relation to the demands of the problem, not a relative judgment of your knowledge versus that of your subordinates.

MPO PROGRAM

Do you have sufficient information to make a high quality decision?

This attribute refers to the degree to which you believe you have sufficient information and expertise to solve the problem by yourself without the aid of your subordinates. The information referred to is that which is relevant to the technical side of the problem, not information as to what solution would most please your subordinates. Note that what is called for is a judgment about your knowledge in relation to the demands of the problem, not a relative judgment of your knowledge versus that of your subordinates.

VROOM/YETTON MODEL

Do subordinates have sufficient additional information to result in a high quality decision?

MPO PROGRAM

Does the subordinate have sufficient information to make a high quality decision?

VROOM/YETTON MODEL

If you were to make the solution by yourself, is it certain to be accepted by your subordinates?

MPO PROGRAM

If you were to make the decision by yourself, is it reasonably certain that it would be accepted by your subordinates?

VROOM/YETTON MODEL

Is conflict among subordinates likely in preferred solution?

MPO PROGRAM

Is conflict among subordinates over preferred solutions likely?

The Vroom/Jago model is regarded by its authors as a revision to the Vroom/Yetton model. Vroom and Jago

registered the Vroom/Jago model, the Leadership and Decision-Making: A Revised Normative Model in the U.S. Copyright Office under copyright registration number Tx-1-457-863. The introduction to this work states that "[t]his revision to the group model originally developed by Vroom and Yetton (1973) makes several changes in both form and substance. Five problem attributes are added to the seven originally proposed." (Plaintiff exhibit 7, p.1). Moreover, Jago characterized the Vroom/Jago model as a "revision of the normative leadership and decision making model that Vic Vroom and I have been working on," in an October 25, 1984 letter he wrote to a Robert L. Trewatha. (Plaintiff exhibit 27). The MPO program is a modification to and an improvement of the Vroom/Yetton model for which K-T has an exclusive license.

Vroom and Jago developed the MPO program during 1984 and 1985, two years before LSI was incorporated, in 1987. Jago read the licensing agreement in 1985. Certainly Vroom was aware of the agreement by 1987 inasmuch as he had read and signed it in 1972. Both Vroom ad Jago knew of K-T's rights to the material at the time LSI was incorporated for the purpose of marketing, the MPO program.

AFFIRMATIVE DEFENSES

Defendants raise a number of affirmative defenses to copyright infringement. First is the claim that the Vroom/Yetton model is in the public domain by virtue of its publication in a December, 1971 article in NOVUS. Unlike all of the other instances in which the model has been published in other books and journals, the NOVUS publication fails to bear a copyright notice. Defendants

argue that this omission places the model in the he public domain. The NOVUS publication in 1971 is governed by the copyright laws which preceded the revisions of those law in 1976, i.e. former Section 21 of Title 17 of the United States Code. This section provides for the circumstance in which the copyright proprietor has sought to comply with the provisions of the copyright laws with respect to notice, but by reason of omission, either through accident or mistake, the prescribed notice has not been given on a particular publication. Such failure to provide a copyright notice did not invalidate the copyright or prevent recovery for infringement against any person who with actual notice of the copyright begins to infringe it. Cf. Kramer Jewelry Creations, Inc. v. Capri Jewelry, Inc., 143 F. Supp. 120 (S.D.N.Y.

1956). There is no evidence to establish that the NOVUS publication without a copyright notice was anything more than inadvertence. The Vroom/Yetton model is not in the public domain.

The defendants' second affirmative defense is that K-T gave them an "oral license" to use the Vroom/Yetton model. As a matter of law, 17 U.S.C. Sec. 204 requires that the valid transfer of copyright ownership be in writing. There is no evidence of any such writing.

Defendants' argue in their third affirmative defense that K-T is estopped to assert its copyright interest because both Jago and Vroom discussed the MPO program with them, and K-T failed to protest that they were, or were in the process of, infringing K-T's copyright. Although it is clear that employees of K-T discussed the MPO program with Jago and

Vroom during the period the program was being developed, there is no evidence that K-T had any knowledge that the program was being sold to the public until February 22, 1990. Two weeks later K-T sought and received a temporary restraining order prohibiting the sale of the program. The timing of the knowledge of sale to the public is crucial to the estoppel argument. Cf. Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127 (N.D. Cal. 1986).

The final affirmative defense put forth by the defendants is the "fair use" doctrine, 17 U.S.C. Sec. 107. There are four factors to consider when deciding a claim for fair use. First, what is the purpose and character of the use? Commercial use of copyrighted material is presumptively unfair. Sony Corp. of America v. Universal City Studios, Inc.,

464 U.S. 417, 449-51 (1984). There is no doubt that the use for the MPO model was commercial in nature.

Second, what is the nature of the copyrighted work? The scope of permissible fair use is narrower with a creative work than it is with an informational work. Cf. Harper & Row, 471 U.S. 539, 563; Consumers Union, 724 F.2d at 1049. Clearly the Vroom/Yetton model is a creative work.

Third, the amount and substantiality of the portions used. This factor seems to be no more than a re-analysis of the substantial similarity test. Cf. 3 Nimmer on Copyright, at 13.05[A][3] (1988). As such, substantial similarity having been found, the defendants cannot meet this test.

Fourth, effect on the market, which the Supreme Court has found to be the

single most important element of fair use. Harper & Row, 471 U.S. at 566. What effect does this sale of the MPO program have on the value of the copyrighted Jago/Yetton model? 17 U.S.C. Sec. 107(4). Although they are in different formats, both are used to train executives in making decisions. One is done by a seminar, the other is done by an executive sitting at a personal computer. It is not speculative to imagine that the executive at his personal computer utilizing the MPO program might fail to take the K-T seminar covering substantially the same material. Given LSI's commercial use of K-T's materials, the likelihood of future harm may be presumed. Id. at 451. Defendants have failed to establish their affirmative defense of fair use.

DAMAGES

It is undisputed that before sales were enjoined in March, 1990, LSI had sold 1,598 copies of the MPO program. K-T seeks to recover the lost profits it suffered because LSI failed to obtain from K-T, the exclusive licensee, the material contained in the MPO program. Each unit of that material sells for $245.00. The revenue thus lost would be $391,510. At 50% profit margin, the lost profits due to K-T would be $195,755.

In the alternative K-T argues that it should be entitled to the Defendant's profits. The MPO program sells for $61.00. Sales revenues for the 1,598 copies would amount to $97,478. K-T argues that, at a profit margin of 64%, defendants' profit would amount to $62,385.92. Defendants countered with Jago's testimony that the MPO program actually sells for three different prices.

The copy protected version sold for $41.00. Approximately 2.5% of the programs sold were copy protected. The non-copy protected version sold for $61.00. Approximately 97.5% of the sales were of the non-copy protected version. In addition a discount was given for sales in quantity. Vroom frequently distributed free and promotional copies of the program. These free copies were included in the 1,598. On the average, then, Jago testified, the MPO program actually sold for $38.80 per copy. Multiplying that figure times the 1,598 copies, LSI's gross revenues would amount to $62,002.40. Jago testified that the gross revenues would be $62,007.00; he estimated that LSI's profits were $45,000-46,000.

Finally, in the alternative, K-T argues that it is entitled to the statutory damages, not to exceed $100.000,

provided for by U.S.C. 504 (c)(2), for a willful infringement. Thus, the evidence on damages ranges from $45,000 to over $300,000. Given the circumstances of this case, the Court finds that damages in the amount of $46,000, defendants' profits, would fairly and adequately compensate K-T for the infringement of its copyright.

INJUNCTIVE RELIEF

K-T seeks not only injunctive relief from the use of the MPO program in effect at the time of the entry, in March 1990, of the temporary restraining order, but further seeks an injunction forbidding the use of the MPO program revised after March, 1990. Title 17 United States Code, Sec. 505(a) gives to the Court the authority permanently to enjoin from copying, manufacturing, distributing, and selling infringing material. Clearly the

MPO program in existence before March, 1990 will be subject to an injunction. The defendants modified the MPO program after March, 1990 in an effort to avoid infringing the K-T copyright. K-T maintains that the new MPO program, although altered, still infringes its copyright in that it retains from old materials the five definitions and the twelve questions, modifying four. These elements, as in the "old" MPO program, are the heart and soul of the copyrighted material. K-T's copyright extends to modifications and improvements. the new program also infringes K-T's copyright.

JOINT AND SEVERAL LIABILITY

K-T has requested that Jago be declares jointly and severally liable with the corporation LSI for the damages awarded in this case. LSI was the only entity which marketed the MPO program. In

order to declare Jago liable for damages it would be necessary to pierce the corporate veil of LSI. Vroom and Jago each own 50% of the shares of stock in LSI, a Subchapter S corporation. Vroom has no day to day input into the business of the company. Defendant Jago is the President and Secretary of LSI in addition to being an owner of 50% of the stock. Although the evidence is clear that LSI is operated as a "cottage industry" by Jago from his home personal computer, the record is devoid of any evidence that corporate formalities were not observed. On the scant evidence before the Court it cannot be said that LSI was Jago's alter-ego. Jago as a corporate officer of the infringing corporation is not liable for the damages inflicted.

ATTORNEY"S FEES AND COSTS

The copyright laws provide that the court in its discretion may allow the recovery of full costs, including attorneys fees to the prevailing party. 17 U.S.C. Sec. 505. The interpretation of this statute has received a variety of interpretations in the Circuits. Cf. Lloyd Lieb, et al v. Topstone industries, Inc., et al. 788 F. 2d 151, 154-156 (3rd Cir. 1986) Nevertheless, the Fifth Circuit's interpretation has been very straightforward. "Although attorney's fees are awarded in the trial court's discretion, they are the rules rather that the exception and should be awarded routinely." Micromanipulator Co., Inc. v. Bough 779 F. 2d 255, 259 (5th Cir. 1985) Costs, including attorney's fees should be awarded to K-T. Accordingly, Plaintiff K-T and defendant LSI will be ordered to attempt to agree to the attorney's fees

reasonable in this case. Should they be unable to give the court an agreed order concerning this matter within 30 days of the date of the Judgment in this case, Plaintiff will be ordered to give to the Court an affidavit outlining its reasonable attorney's fees in light of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 717-19 (5th Cir. 1984). Thereafter the Court will entertain opposing affidavits, or if necessary, will hod a hearing to determine the reasonable attorneys fees to be awarded in this case.

SIGNED at Houston, Texas, this 7th day of January, 1992.

Melinda Harmon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2481

KEPNER-TREGOE, INC.,

Plaintiff/Appellee

v.

LEADERSHIP SOFTWARE, INC.

Defendant/Appellant

Appeal From The United States District Court
For The Southern District of Texas

ON PETITION FOR REHEARING

(MARCH 16, 1994)

Before JOHNSON, WIENER, and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed

in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

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Copyright Protection Not Available For Names, Titles or Short Phrases

SHORT EXPRESSIONS NOT PROTECTED BY COPYRIGHT

Names, titles, and short phrases or expressions are not subject to copyright protection. Even if a name, title or short phrase is novel, distinctive, or lends itself to a play on words, it cannot be protected by copyright. The Copyright Office cannot register claims to exclusive rights in brief combination of words, such as:

- Names of products and services;
- Names of businesses, organizations or groups (including the name of a group of performers);
- Names of pseudonyms of individuals (including a pen name or stage name);
- Titles of Works;
- Catchwords, catch phrases, mottoes, slogans, or short advertising expressions;
- Mere listings of ingredients, as in a recipe or formula; however, when a recipe or formula is accompanied by substantial literary expression in the form of explanation or directions, or when there is a compilation of recipes, there may be a basis for copyright protection.

SUBJECT MATTER OF COPYRIGHT

Copyright protection under the copyright law (title 17 of the United States Code, section 102)

extends only to "original works of authorship." The statute states clearly that ideas and concepts cannot be protected by copyright. To be protected by copyright , a work must contain at least a certain minimum amount of authorship in the form of original literary, musical, or graphic expression. Names and titles, and other short phrases do not meet these requirements.

COPYRIGHT OFFICE RECORDS: WHY ARE TITLES LISTED

The titles of registered works are filed alphabetically and appear in that order in the indexes and catalogs of the Copyright Office.

However, the presence of a title in the Copyright Office registration records does no mean that the title itself is copyrighted or subject to copyright protection. In many cases, our records show the same or closely similar titles for entirely different works.

PROTECTION UNDER TRADEMARK OR UNFAIR COMPETITION LAWS

Some brand names, trade names, slogans, and phrases may be entitled to protection under the general rules of law relating to unfair competition, or to registration under the provisions of the trademark laws. The Copyright Office has no jurisdiction in these matters. Questions about the trademark laws should be addressed to the Commissioner of Patents and Trademarks, Washington, D. C. 20231.